In the

Supreme Court of the United States

OCTOBER TERM 1977

No. 78-415

HAROLD MAGNUSON,
Petitioner,

vs.

BURLINGTON NORTHERN INC.,
D.S. NELSON, J.H. WOOLFORD
and G.J. O'CONNELL,
Respondents

RESPONDENTS' BRIEF

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INDEX

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

1. No Departure from Accepted and Usual Course of Judicial Proceedings 3
2. Important Question of Federal Law Previously Settled 5
3. No Conflict in Decisions. 6

CONCLUSION 9

APPENDIX A: Article 24 of Union Contract Between Burlington Northern Inc. and American Train Dispatchers Association A-1

APPENDIX B: Letter of Discharge dated May 21, 1971 ..... B-1

TABLE OF CASES

Page

Agwilines, Inc. v. NLRB
87 F.2d 146 (C.A. 5 1936) 5

Andrews v. Louisville & Nashville Railroad Company,
406 U.S. 320, 32 L.Ed.2d 95, 92 S.Ct. 1562 ..... 2, 3, 7, 8, 9

Atlas Roofing Co. v. Occupational Safety Commission,
430 U.S. 442, 51 L.Ed.2d 464, 97 S.Ct. 1261 (1977) 6

Bourjois, Inc. v. Chapman,
301 U.S. 183, 57 S.Ct. 691 4

Brotherhood of Railway Trainmen v. Denver & R.G.W.R. Co., 370 F.2d 833 (C.A. 10 1966) 5

Carle v. Conrail, 426 F Supp. 1045
(S.D.N.Y. 1977) 4

Curtis v. Loether, 415 U.S. 189,
39 L.Ed.2d 260, 94 S.Ct. 1005 (1964) 6

Edwards v. St. Louis-San Francisco Railroad Company,
361 F.2d 946 (C.A. 7, 1966) 4

Farmer v. United Brotherhood of Carpenters & Joiners, 430 U.S. 290, 51 L.Ed.2d 338, 97 S.Ct. 1056 7

Gunther v. San Diego & Arizona E.R. Co.,
382 U.S. 257, 15 L.Ed.2d 308, 86 S.Ct. 368 5

Mickey v. Mississippi, 292 U.S. 393, 54 S.Ct. 743 4

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893... 5

Northwest Airlines, Inc. v. Air Line Pilots Association,
373 F.2d 136 (C.A. 8 1967) 5

Otto v. Houston Belt and Terminal Railway Company,
319 F.Supp. 262 (S.D. Tex. 1970) 4

Rowan v. United States Post Office,
397 U.S. 728, 90 S.Ct. 1484 4

TABLE OF CASES (cont.)

Page

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, ____U.S. ____, 56 L.Ed.2d 209, 98 S.Ct. ____ (May 1978) 8

United Steel Workers v. Enterprise Corporation,
363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1358 5

STATUTES

45 U.S.C.A. Section 153 First (i) 2

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Petitioner was a railway dispatcher. A train collision occurred. His employer, the respondent herein, conducted an investigation or hearing to determine petitioner's responsibility. The hearing was conducted pursuant to provisions of the union contract between Burlington Northern Inc. and American Train Dispatchers' Association, petitioner's union. The hearing provisions appear in Article 24 of the contract and are set forth in Appendix A to this brief. After the hearing petitioner was discharged. The letter of discharge is reproduced herein as Appendix B.

These facts, taken with the facts and documents set forth in the petition provide an adequate basis for the presentation of the issues set forth in the petition. Respondent, of course, does not by any statement contained herein admit that the discharge was wrongful.

SUMMARY OF ARGUMENT

The proceedings conducted by the railroad, leading to the discharge of the petitioner from its employ, were clearly conducted pursuant to union contract (Appendix A). After the hearing or investigation the petitioner was discharged (Appendix B). The dispute was therefore treated as one authorized and governed by *45 U.S.C.A. Section 153 First (i)* which provides that "the disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions. . .shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. . ."

Under the facts, therefore, the case fits precisely under the rule expressed in *Andrews v. Louisville & Nashville Railroad Company, 406 U.S. 320, 32 L.Ed. 2d 95, 92 S.Ct. 1562,* unless the plaintiff can succeed in demonstrating a materially different fact situation or a constitutional defect in the Railway Labor Act premised upon petitioner's alleged right to trial by jury.

Petitioner has alleged in "Questions Presented" (petitioner's brief, page 2) and "Reasons for Granting the Writ" (petitioner's brief, page 5) three basic reasons for relief. They are (1) lack of due process at the company investigation level, (2) plaintiff is denied right to trial by jury, and (3) federal law does not pre-empt local jurisdiction for adjudication of the acts complained of.

We think it is clear that due process requirements do not attach at a private, company level hearing. Due process does attach to an Adjustment Board hearing. Petitioner's own cited authorities demonstrate this rule and if as apparently contended by petitioner due process is not afforded at Board level, then relief can be granted in the district court.

If the discharge proceeding falls within the ambit of a federal administrative scheme to foster industrial labor peace, then right to trial by jury does not attach, and by the same measure the case falls under and is governed by *Andrews,* supra.

Following is a more detailed analysis of the three issues in the same order as hereinabove stated, bearing relevant titles derived from *U.S. Sup.Ct. Rule 19, 28 U.S.C.A.*

1. NO DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Petitioner asserts that he was not accorded due process at the on-property company hearing or investigation. Absence of due process is alleged by reason of (a) fraud in the

production of testimony, and (b) inadequacy of notice of hearing with respect both to time and specificity of charges.

The on-property investigation or hearing was conducted pursuant to provisions of the union contract. The relevant article of the contract is reproduced in Appendix A to this brief. Due process requirements apply to proceedings of the Railroad Adjustment Board. They do not apply to the initial investigation or hearing provided for under the union contract which is an agreement between private parties. See *Otto v. Houston Belt and Terminal Railway Company, 319 F.Supp. 262 (S.D. Tex. 1970)* (claimant not allowed legal counsel); *Carle v. Conrail, 426 F.Supp. 1045 (S.D. N.Y. 1977)* (action to enjoin initial hearing, alleging conspiracy to harrass and silence plaintiff employee, action deemed "a private dispute between two parties governed by a collective bargaining agreement"); *Edwards v. St. Louis-San Francisco Railroad Company, 361 F.2d 946 (C.A. 7, 1966)* (railroad failed to produce accusing witness at initial hearing). See also numerous authorities cited in *Edwards*. Due process requirements need not be met at an initial hearing, provided due process is afforded upon review. *Mickey v. Mississippi, 292 U.S. 393, 54 S.Ct. 743, Bourjois, Inc. v. Chapman, 301 U.S. 183, 57 S.Ct. 691, Rowan v. United States Post Office, 397 U.S. 728, 90 S.Ct. 1484.*

It is clear that proceedings of the Railroad Adjustment Board itself must accord due process. *Edwards v. St. Louis-San Francisco Railroad Company,* supra. However, no order of the Railroad Adjustment Board is under attack in this proceeding. The action under attack here is company action, i.e., the discharge of the petitioner from his employment. Accordingly, all of the authorities cited by petitioner in pages 12 to 18 of his brief are inapposite. All such authorities pertain to and require due process in actions of the Railroad Adjustment Board itself.

Petitioner has not pursued his administrative remedies. His complaints were all subject to review by the Board. He does not present a due process question.

2. IMPORTANT QUESTION OF FEDERAL LAW PREVIOUSLY SETTLED

Petitioner contends he was denied a jury trial and that in so doing the Court of Appeals decided an important question of law which has not been, but should be settled by this court, in that it deprived him of a right to trial by jury. The question has in fact been decided. This is an administrative proceeding. The right to trial by jury does not exist with respect to such proceedings. *United Steel Workers v. Enterprise Corporation, 363 U.S. 593, 4 L.Ed.2d 1424, 80 S.Ct. 1358; National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893; Gunther v. San Diego & Arizona E.R. Co., 382 U.S. 257, 15 L.Ed.2d 308, 86 S.Ct. 368; Brotherhood of Railway Trainmen v. Denver & R.G.W.R. Co., 370 F.2d 833 (C.A. 10 1966); Agwilines, Inc. v. NLRB, 87 F.2d 146 (C.A. 5 1936); Northwest Airlines, Inc. v. Air Line Pilots Association, 373 F.2d 136 (C.A. 8 1967).*

In *Atlas Roofing Co. v. Occupational Safety Commission, 430 U.S. 442, 51 L.Ed.2d 464, 97 S.Ct. 1261 (1977),* this court reaffirmed that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme.

Compare *Curtis v. Loether, 415 U.S. 189, 39 L.Ed.2d 260, 94 S.Ct. 1005 (1964).*

Petitioner here urges this court to treat his complaint only as a claim for intentional infliction of emotional distress, thereby avoiding the issue of wrongful discharge. See petitioner's brief, page 12. This cannot be done. As noted by the court below, "this action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA." See petitioner's brief, page A-4.

This observation is correct. Consequently there is no unsettled question of federal law, it having been long since settled and determined that right to trial by jury is not available in the determination of disputes arising under or governed by statues regulating and declaring national labor policy.

3. NO CONFLICT IN DECISIONS

Petitioner contends that his complaint is not for wrongful discharge and thus governed by the Railway Labor Act, but rather is to redress a tort which does not involve any

conduct regulated by the RLA. The tort is variously described as conspiracy, extrinsic fraud, "outrageous conduct" and management cover-up and whitewash. Petitioner thus seeks to avoid the force of *Andrews v. Louisville & N.R. Co.*, supra, and to escape under an alleged exception to the exclusive jurisdiction in the Railroad Adjustment Board as expressed in *Farmer v. United Brotherhood of Carpenters & Joiners, 430 U.S. 290, 51 L.Ed.2d 338, 97 S.Ct. 1056.*

The factual similarity between *Andrews* and this case is remarkable. In each case the plaintiff was discharged, elected not to pursue reinstatement, but rather sought compensation for the alleged wrongful discharge.

An entirely different set of facts operated in *Farmer.* There the claimant sought damages against his union alleging that it discriminated against him in referrals to employers and subjected him to a campaign of personal abuse and harrassment. *Farmer does not involve a wrongful discharge.*

Since Magnuson's claim is bottomed upon and arises out of a wrongful discharge, it is governed by *Andrews.* There is no conflict as contended by petitioner.

The fact that both Magnuson and Farmer sought compensatory and punitive damages and that abusive conduct is alleged in both does not operate to place Magnuson's claim under the exception stated in *Farmer.* This court in that case very carefully pointed out that the enforcement of the claim in *Farmer* did not involve enforcement of a

federally protected right and that "concurrent state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme."

Since wrongful discharge is the gravamen of the complaint filed by Mr. Magnuson, and since wrongful discharge is clearly federally regulated (see *Andrews*), it follows that preemption occurs. A wrongful discharge hearing before the Railroad Adjustment Board would involve exactly the same facts as a trial on petitioner's complaint filed in state district court. A finding of wrongful discharge would be the predicate for a recovery in either case. This court said in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* _____ *U.S.* _____, *56 L.Ed.2d 209, 98 S.Ct.*_____*(May, 1978):*

> "The critical inquiry, therefore, is not whether the state is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in Garner) or different from (as in Farmer) that which could have been, but was not, presented to the labor board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the Garman doctrine was designed to avoid."

Respondent submits that the exact same controversy is involved in the state court action filed by the petitioner as would be involved had the petitioner proceeded to an Adjustment Board hearing.

Artful pleading, strained construction of his own complaint, and petitioner's alleged wounded feelings and emotional distress should not be used as levers to pry loose a claim otherwise cognizable by the Railroad Adjustment Board. To allow this result would be tantamount to depriving the Railroad Adjustment Board of jurisdiction in wrongful discharge claims, because a simple change of nomenclature would result in something other than a wrongful discharge issue.

This argument also demonstrates that this is an administrative procedure wherein the petitioner is not entitled to trial by jury and where trial by jury would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the RAB's role in the statutory scheme.

CONCLUSION

This case is squarely governed by *Andrews.* Wrongful discharge is the gravamen of the complaint. Trial by jury is not afforded. The petition should be denied.

Respectfully submitted

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CERTIFICATE OF MAILING

The undersigned, BRUCE RYAN TOOLE, a member of the Bar of the Supreme Court of the United States does hereby certify that he mailed three copies of the Respondents' Brief to the Petitioner by mailing the copies postage pre-paid on ~~September~~ October 2, 1978, to his counsel, Mr. John C. Hoyt, P.O. Box 2807, Great Falls, Montana 59403.

Bruce Ryan Toole

APPENDIX A
ARTICLE 24 OF
UNION CONTRACT BETWEEN
BURLINGTON NORTHERN INC.
AND
AMERICAN TRAIN DISPATCHERS ASSOCIATION

(RECORD ON APPEAL, PAGE 89)

ARTICLE 24

(a) DISCIPLINE

A train dispatcher shall not be disciplined, demoted or dismissed without proper investigation as provided in Section (b) of this Article, except as provided in Article 11(e). Suspension pending such investigation shall not be deemed a violation of this principle.

(b) INVESTIGATIONS

A train dispatcher who is charged with an offense which, if proven, might result in his being disciplined, shall be notified in writing of the nature of the complaint against him within five (5) days from date that knowledge of the facts on which such complaint is based was received by the Superintendent, and he shall be given a fair and impartial investigation by the Superintendent or a designated representative within five (5) days of the date of such notice, except reasonable postponements shall be granted at the request of either the Company or the train dispatcher.

The train dispatcher shall have the right to be represented by his duly accredited representative and shall be given reasonable opportunity to secure the presence of witnesses. The train dispatcher's representative shall be permitted to hear all oral testimony, read all records referred to in the investigation and question all witnesses. The decision shall be rendered within twenty (20) days from date of investigation and any discipline must be put into ef-

fect within five (5) days from date of decision. If not effected within five (5) days, or if train dispatcher is called back to service prior to completion of suspension, any unserved portion of the suspension period shall be cancelled.

(c) APPEALS.

A train dispatcher dissatisfied with decision shall have the right to appeal to the next higher proper officer provided written request is made to such officer and a copy furnished to the officer whose decision is appealed within sixty (60) days of the date of advice of the decision. The right of further appeal in the regular order of succession, up to and inclusive of the highest official designated by the company to whom appeal may be made, is hereby established.

Decisions of the highest designated officer shall be considered final and binding unless, within ninety (90) days from date of such decision, he is notified in writing that it is not accepted, in which event the case shall be considered closed and barred unless it be referred to the appropriate tribunal provided by law within one (1) year from the date of the decision of the highest designated officer.

(d) TRANSCRIPT.

A transcript will be made of all statements, reports and information made a matter of record at the investigation and a copy of such transcript will be furnished on request to the employee or his representative.

(e) REINSTATEMENTS.

If the decision on the original hearing or on an appeal

be in favor of the train dispatcher, his record shall be cleared of the charge and, if suspended, demoted or dismissed, he shall be reinstated and compensated for wage loss suffered by him, less any earnings in other employment. On notice of reinstatement he will, within ninety (90) days from date of notice, return to service and exercise seniority as provided for in Article 9. Failing to return to service within time specified herein will constitute forfeiture of seniority.

(f) GRIEVANCES--CLAIMS.

A train dispatcher who considers himself unjustly treated shall present his grievance to claim in writing direct, or through his duly accredited representative, to the Superintendent within sixty (60) days from date of occurrence on which it is based, and decision of the Superintendent shall be rendered within sixty (60) days from date grievance or claim is received, or from date of conference, if one is had thereon. If the train dispatcher is not satisfied with the decision rendered, appeals may be made subject to the order of progression, time limits, etc., provided in Section (c) of this Article.

(g) ACCREDITED REPRESENTATIVE.

The reference to "duly accredited representative", as used in this agreement, shall be interpreted to mean only the officers or committeemen of the American Train Dispatchers Association, or a train dispatcher authorized to act for them.

APPENDIX B
LETTER OF DISCHARGE
DATED MAY 21, 1971

(RECORD ON APPEAL, PAGE 135)

BURLINGTON NORTHERN
Great Falls, Montana
May 21, 1971

Mr. Harold M. Magnuson
Dispatcher
Harlem, Montana

You are hereby notified that you are dismissed from the service of the Burlington Northern Inc. effective May 21, 1971 for your responsibility in connection with collision of Extra 2025 East and Extra 2013 West at about 11:45 PM on May 11, 1971 just west of Sheffels, Montana.

Facts were developed in investigation held at Havre, Montana on May 17, 1971 and it was determined that you violated Rule 220(B) of the Consolidated Code of Operating Rules and Item 70 of the Train Dispatchers Manual.

Arrange to relinquish all company property.

s/D.S. Nelson
D.S. Nelson
Superintendent